IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH ~~RUBBER~~ COMPANY, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

REPLY BRIEF OF PETITIONER.

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INDEX.

AUTHORITIES CITED.

Cases.

Text.

Statutes.

Reports, Bulletins and Regulations.

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INTRODUCTION.

The Circuit Court of Appeals decided this case upon one point only. The petition for certiorari and the brief of petitioner likewise discussed only that one point. The Government's brief now raises three additional questions not considered by the Circuit Court of Appeals. They relate (1) to the validity of the proviso contained in Section 9(a) of the Agricultural Adjustment Act, (2) to the applicability of such proviso to cotton taxed under Section 16 of said Act, and (3) to the sufficiency of petitioner's proof in support of its claim that the taxes sought to be recovered were not passed on.

Plainly, the validity of the proviso, as affected by the decision in the *Butler* case (*United States v. Butler*, 297 U. S. 1), is a question which must be considered in its relation to the facts in the instant suit. *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners*, 113 U. S. 33, 39; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324; *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 355. Furthermore, orderly discussion would

seem to require that we reach some conclusion regarding the meaning of the law before attempting to decide to what extent it may now be inoperative. Accordingly, in this brief we first reply to respondent's second contention.

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE PROVISO IN SECTION 9(a) OF THE AGRICULTURAL ADJUSTMENT ACT DOES APPLY TO PROCESSED COTTON TAXED UNDER SECTION 16 OF SAID ACT.

(Answering Respondent's Brief, 23-30.)

The Agricultural Adjustment Act, enacted May 12, 1933 (48 Stat. 31; 7 U. S. C. 1940 Ed., Section 601, *et seq.*), authorized a tax upon the first domestic processing of certain specified basic agricultural commodities, including cotton. The Act does not by its own terms directly impose any tax. It authorized the Secretary of Agriculture to make certain fact determinations and upon the basis thereof to fix the rate of tax, if any, and the date when such tax should take effect.

In Section 16 of said Act Congress provided that in the event the Secretary of Agriculture should fix a tax upon the first domestic processing of any of the specified commodities a tax equivalent in amount should automatically be imposed upon all then existing supplies of the processed commodity in question. This is a usual and customary provision which is found not only in our tariff laws, but also in the enactments of excise taxes imposed upon manufactured articles. As hereafter pointed out, it had for its purpose the prevention of unfair discrimination.

Prior to the enactment of the Agricultural Adjustment Act, at the time when the bill was pending before the United States Senate, attention was called to the fact that under the Revenue Act of 1932 there was an existing tax of two and one-fourth cents per pound upon automobile tires sold

in the domestic trade (including the cotton content thereof), and that under the bill, in the event a processing tax should be imposed upon cotton, double taxation would result in so far as the cotton might later be used in the manufacture of automobile tires (77 Cong. Rec. 1959). Presumably to avoid that consequence Congress, by Senate amendment, incorporated in Section 9(a) the following proviso:

> "Provided: That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid."

On July 14, 1933, the Secretary of Agriculture announced that the first "marketing year" for cotton should begin August 1, 1933, and that the tax on the first domestic processing of cotton should be at the rate of 4.4184 cents per pound. (T. D. 4389.) Thus, by virtue of this determination and by virtue of Section 16 of the Act, on and after August 1, 1933 all processed cotton became subject to a tax of 4.4184 cents per pound, irrespective of whether the processing of such cotton had occurred before or after such date.

With respect to the foregoing the position taken by respondent is substantially as follows. The Government contends that the tax under Section 9(a) and the tax under Section 16 are two separate and distinct tax provisions; that the tax under Section 9(a) is strictly and technically a processing tax since by its terms it is imposed upon the first domestic processing; that the tax under Section 16 is a tax upon the possession of processed cotton; and that since the tax under Section 16 does not come into effect until after the processing has taken place the tax is not a

"processing tax" within the meaning of that term as used in the proviso contained in Section 9(a).

Manifestly this argument depends for its validity upon the hypothesis that the two provisions are to be regarded as separate and independent. If Congress in fact intended that the two provisions should be read together, both as part of one tax, the contention of the Government falls to the ground. Thus it becomes our first duty to consider the language of the law in its context.[1]

A. Respondent's construction of the Agricultural Adjustment Act is inconsistent with its language and purpose.

Section 16(a) of the Agricultural Adjustment Act, so far as pertinent, provides:

> "Upon * * * any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, * * * there shall be made a *tax adjustment* as follows:
>
> (1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with

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[1] Respondent argues (Br. 26) that there is a presumption that a proviso refers only to the provision to which it is attached. Here again, however, the matter is determined by the legislative intent (see *United States v. McClure*, 305 U. S. 472) and the modern rule is that no presumption arises from the mere location of the proviso that it is applicable only to the section in which it appears or to preceding sections. 2 *Sutherland Statutory Construction* (3rd Ed.), p. 472; *McDonald v. United States*, 279 U. S. 12; *Hopkins v. Hopkins*, 287 Mass. 542, 192 N. E. 145; *Kellen v. Boyne*, 239 Mich. 204, 214 N. W. 316; *Reuter v. Board*, 220 Cal. 314, 30 Pac. (2d) 417.

The proviso clause in Section 9(a) in no way limits the effect nor provides an exception to the operation of Section 9 (a). It in no way reduces the tax collected under Section 9(a). In effect, this proviso clause limits the operating effect of the Manufacturers' Excise Tax in that it excludes the weight of the cotton from the weight of the tire in computing the tax. The proximity of the location of this provision to the taxing provision of Section 9(a) therefore loses any significance.

> respect to the commodity from which processed if the processing had occurred on such date." (Italics supplied.)

The question raised by the above language is whether Congress intended thereby to impose a separate and distinct tax, or intended, by way of "adjustment," to extend the processing tax to all existing supplies of cotton upon the effective date of the tax irrespective of the time when the processing occurred. The expression "to adjust" means "to equalize," literally "to make just." In this connection the use of that expression would seem to show an intent to abolish the distinction, for which the Government here contends, predicated upon the wholly irrelevant circumstance as to the time of actual processing. An adjustment of the processing tax, and this is the only descriptive language or designation found in the law itself, would seem to be literally and technically a part of the tax so to be adjusted. This conclusion is compelled not only by the language of the law but also by a consideration of its legislative history.

Thus Mr. Mordecai Ezekiel, Economic Advisor of the Department of Agriculture, before the Senate Committee on Agriculture (Senate Hearings on H. R. 3835, 73d Cong., 1st Sess. (1933) 64), in response to a question by Senator Norris respecting the purpose of Section 16, explained such purpose as follows:

> "This is the idea of that, Senator: If at the time the processing tax on wheat goes into effect the wheat miller and the wholesale baker should have on hand any considerable quantity of flour milled without payment of the tax, if no provision were made for a tax on that, they would try to mill ahead enough to last, say, half a year, just like they try to bring in goods before the tariff is levied, so it is customary in a revenue tax of this kind to insert a provision prohibiting them from evading the tax by processing ahead of time. A similar provision is in many of the

manufacturers' taxes already passed by Congress, and this simply says that whatever they hold at that time has to pay a corresponding tax, even though it is a processing tax.

* * *

Senator Norris. They just take the stock they have on hand and make them pay the same tax as though they had purchased it after the tax went into effect.

Mr. Ezekiel. That is the point; yes."

Thus in H. R. Rep. No. 6, 73d Congress, 1st Sess. (1933) 5, the purpose underlying the forerunner of what subsequently became Section 16(a) is stated in the following terms:

"In order to make effective the operation of the tax provisions and to *prevent unfair discriminations* resulting therefrom, certain supplemental revenue provisions are included in the bill. These are as follows:

* * *

(c) There is levied upon floor stocks, when the processing tax first goes into effect with respect to any commodity, a tax equal to the processing tax which would have been payable with respect to the commodity from which the floor stocks are processed if their processing had occurred when the processing tax was in effect. A corresponding refund is provided on floor stocks when the processing tax finally terminates.

* * *

*The above supplemental revenue provisions serve * * * to prevent unfair competition within any industry.*"[1] (Italics supplied.)

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[1] This purpose was later confirmed in H. R. Rep. No. 2475, 74th Cong., 2d Sess. (1936), wherein it was stated (p. 15):

"The Agricultural Adjustment Act provided for a floor-stocks tax on the effective date of the processing tax *in order that all articles, the product of a commodity subject to the processing tax, should move into the channels of trade equally taxed.*" (Italics supplied.)

B. Respondent's construction of the Act renders it discriminatory, unenforceable and absurd.

It is elementary that in construing the meaning of any law the courts are not required to interpret the language thereof in a vacuum. Furthermore, since the intent of Congress is the law, the Court is entitled to place itself in the position of Congress by examining the facts upon which the law was designed to operate, to the end that the law may be given a construction which effectuates rather than defeats the intention of Congress; and as a corollary to that, to the end that the law may not be given a meaning and interpretation which is merely absurd. *American Tobacco Company v. Werckmeister*, 207 U. S. 284, 293; *Ozawa v. United States*, 260 U. S. 178, 194; *Barrett v. Van Pelt*, 268 U. S. 85, 90; *Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Helvering v. New York Trust Company*, 292 U. S. 455, 464-465; *Darby-Lynde Co. v. Alexander* (C. C. A. 10), 51 F. (2d) 56, 58; *Grier v. Keenan* (C. C. A. 8), 64 F. (2d) 605, 606-7.

Since the Government takes the position that the tax under Section 9(a) and the tax under Section 16 are two separate and distinct tax provisions, the Government is compelled to defend the position that Congress intended to create two separate and distinct classifications of cotton for tax purposes. According to this contention, in the first classification there is embraced all cotton processed on and after August 1, 1933, the effective date of the Act, and such cotton was subject to only one tax, namely, the tax of 4.4184 cents per pound. In the second classification is embraced all cotton processed prior to August 1, 1933. According to the Government's contention it was the intent of Congress that all such cotton should be subject to two taxes, namely, a tax of 4.4184 cents per pound under the Agricultural Adjustment Act and in addition, in so far as such cotton might subsequently be used in the manufacture of automobile tires, the further tax under the Manu-

facturers' Excise Tax law of two and one-fourth cents per pound. Obviously this interpretation of the law renders the Act discriminatory and absurd. It imputes to Congress an intent, at a date in the future to be fixed by the Secretary of Agriculture, to diminish the value of then existing supplies of cotton by imposing thereon a tax burden not imposed upon cotton subsequently processed.

It is no answer to this to say, as respondent does (Resp.'s Br. 29), that the double taxation is corrected or that the discrimination is removed when the processing tax is wholly terminated, by the provision in Section 16(a)(2) authorizing the refunding of the processing tax on all supplies of processed cotton held on that date. While this provision does have the effect of placing all taxpayers and all supplies of the processed commodity on a basis of equality (which was the manifest purpose of Section 16(a)(1) as well as of Section 16(a)(2)), it does not go beyond this and does not provide a windfall to the tire manufacturer as implied in respondent's brief. By no stretch of the imagination does it restore to the tire manufacturer any part of the double tax imposed under respondent's theory at the outset of the tax period.[1] If it

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[1] This appears from the following considerations.

(1) The proviso does not apply in favor of cotton in respect of which the tire manufacturer is entitled to a refund of the processing tax at the end of the tax period. This is conceded by respondent. (Respondent's Br. 29.)

(2) It may not be assumed that the refund to the tire manufacturer of the amount of the processing tax on floor stocks held at the termination of the processing tax would constitute a windfall. With respect to such floor stocks the presumption is that the price paid therefor included the processing tax and this was the very theory of the processing tax law.

(3) It is plain that under the Government's construction, at the outset of the tax period, cotton used in the manufacture of automobile tires was subject to two taxes (the tax under Section 16

(*Continued on next page*)

can be supposed that Congress foresaw the double taxation of cotton taxed under Section 16, resulting from respondent's interpretation, it may also be supposed that Congress would have found some direct and appropriate means of avoiding it. Plainly the refund provided in Section 16 to be paid to the holder of the cotton when the tax is terminated was made upon the theory that such holder either paid the processing tax or absorbed it in the price paid for its purchase, and was not made as an indiscriminate reward to offset a recognized inequality.

The absurdity resulting from respondent's interpretation of the law does not stop at this point. If Congress had intended to create two separate classifications of cotton for tax purposes it is to be presumed that Congress would have implemented such intent by providing for the identification of the cotton taxed under Section 16. The Agricultural Adjustment Act does not provide for the labeling of cotton processed prior to the date to be fixed by the Secretary of Agriculture. The regulations issued by the United States Treasury Department do not require nor provide for the marking or identification of cotton processed prior to August 1, 1933. A manufacturer receiving a supply of processed cotton subsequent to August 1, 1933 had no means of knowing whether such cotton had been taxed under Section 9(a) or under Section 16 of the Act.

Thus, as construed by the Government, the double taxation of cotton processed prior to August 1, 1933 falls only upon the tire manufacturer and only upon the stocks actually in his hands on that date. Cotton processed prior to

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(*Continued from preceding page*)

of the AAA and the Manufacturers' Excise Tax). It follows from (1) above that at the end of the processing tax period the Manufacturers' Excise Tax was restored on the full weight of the tire. Hence at all times cotton used in the manufacture of tires was subject to at least one tax. Therefore, under the Government's interpretation, the double taxation of the cotton taxed under § 16 (a) (1) remains and is in no way offset.

August 1, 1933 would have one value in the hands of a rubber tire manufacturer and another and higher value in the hands of the processor from whom the tire manufacturer purchases his supply. So construed the Act not only discriminates against the tire manufacturers but also contradicts the intention expressed in Section 16(a)(2) making the law applicable to all supplies of cotton and to all holders thereof other than holders for retail sale.

To be sustained as a tax measure the construction of the provisions here involved must have some proper relation to the production of revenue. The Manufacturers' Excise Tax law does not apply to all products manufactured from rubber and processed cotton. It applies only to tires and automobile accessories. It does not apply to all tires. It does not apply to tires sold to governments or for export. Thus if Congress intended that cotton taxed under Section 9(a) should not be subject to the Manufacturers' Excise Tax and that cotton taxed under Section 16 should be subject thereto, and if this intention had been made reasonably plain, either by the provisions of the Act itself or by the regulations issued thereunder, no additional revenue could possibly have resulted through double taxation under the law as so construed. The rubber tire manufacturer, who as we have seen is alone affected, would merely devote supplies of processed cotton on hand August 1, 1933 to the manufacture of articles not subject to Manufacturers' Excise Tax. In so far as any such cotton entered the manufacture of tires, such tires would be set aside for sale to governments or for export. Since no provision is made in the Act for identification by processors of cotton taxed under Section 16, the tire manufacturer was free to use any cotton delivered to him after August 1, 1933 without becoming subject to the Manufacturers' Excise Tax thereon. Thus

the Government's construction fails of any purpose to produce revenue, except by entrapment of the taxpayer.[1]

As the foregoing considerations show, under the Government's interpretation of Sections 9(a) and 16, the law becomes absurd. To say that such interpretation is nevertheless compelled by the language of the Act is equally absurd. There is nothing in the Act to show an intention to create two classifications of processed cotton for tax purposes. There are no provisions in the Act for the identification of cotton processed prior to August 1, 1933, essential to the enforcement of the tax and to avoid discrimination. There is nothing in the debates before Congress or in the legislative history to show that Congress intended to single out stocks in the hands of tire manufacturers as the only stocks to be subject to double taxation. There is nothing in the record to support a construction of the law which, if understood, could only restrict the use of relatively limited stocks of processed cotton in the hands of the tire manufacturer, without any revenue producing effect. Upon this issue, plainly the decision of the District Court was correct.

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[1] The Treasury Department in its bulletin, "Regulations 81," issued under date of July 12, 1933, to advise taxpayers respecting their rights and obligations under the Agricultural Adjustment Act, in its discussion of Section 16, is wholly silent with respect to whether taxes imposed thereunder are "processing taxes" within the meaning of subsection 9(a), whereas under Section 15(c), relating to "compensating tax," the statement appears: "The compensating tax is not a processing tax but is a tax on imported articles."

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE PROVISO IN SECTION 9(a) OF THE AGRICULTURAL ADJUSTMENT ACT WAS NOT RENDERED INOPERATIVE, AB INITIO, BY VIRTUE OF THE DECISION IN UNITED STATES v. BUTLER.

(Answering Respondent's Br. 13-23.)

Having considered the meaning of the law we turn to the question of the effect thereon of this Court's decision in the *Butler* case. The question presented is whether the invalidity of the tax under the Agricultural Adjustment Act invalidates the proviso contained in Section 9(a) thereof, and more particularly whether such proviso becomes inoperative *ab initio*. Since this suit involves a sales tax on tires sold by the taxpayer long prior to the decision in the *Butler* case, the Government must necessarily contend, not merely that the proviso has ceased to confer any rights with respect to tires manufactured and sold subsequent to the termination of the processing tax, but that no valid rights were ever conferred by the proviso. Obviously the inducement for the proviso was the payment of the processing tax and hence the precise issue is whether Congress would have wished that invalidity of the tax, which was the inducement for the proviso, should invalidate, *ab initio*, the proviso itself. *Dorchy v. Kansas*, 264 U. S. 286; *Williams v. Standard Oil Co.*, 278 U. S. 235.

Section 14 of the Agricultural Adjustment Act reads as follows:

> "SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby."

The foregoing section gives rise to a presumption of separability. *Carter v. Carter Coal Co.*, 298 U. S. 238; *Electric*

Bond & Share Co. v. Securities & Exchange Commission, 303 U. S. 419. It throws upon the Government the burden of showing that Congress did not intend to grant any vested rights under the proviso and that the clear inference to be drawn from the law is that Congress intended that exemption from the second tax (the excise tax) should depend upon the validity of the first.

Accepting this burden, respondent nevertheless argues "that Congress would not have wanted the valid manufacturers' sales tax to be reduced on account of the payment of an unconstitutional processing tax"; that the sole purpose of the proviso was to prevent double taxation, and that in so far as the unconstitutional processing tax might be recovered by the taxpayer, the proviso not only loses its purpose but has the effect of exempting the cotton "even from single taxation." (Resp. Br. 20.)

A. The argument that invalidity of the proviso, ab initio, must be presumed to avoid tax exemption, does not apply.

In making its argument that Congress must have intended that the proviso should fall with the tax, respondent overlooks the element of time. The processing tax, excepting Section 16, being a tax on the "first domestic processing," is a tax paid by the processor. It is not paid by the automobile tire manufacturer except as it may have been included in the price of the cotton. Between August 1, 1933, the effective date of the processing tax, and January 6, 1936, the date of the decision in the *Butler* case, all tires sold in the United States to the domestic trade were sold in reliance upon the statement expressly written into the law that the weight of the cotton content thereof was not subject to the Manufacturers Excise Tax. Thus respondent is seen to argue that because one taxpayer, the processor, may become entitled to the repayment of an un-

constitutional tax, it follows that Congress would have wished, by way of an *ex post facto* exaction and contrary to the express provision of a presumably valid statute, to recoup from another and different taxpayer, the automobile tire manufacturer, and under a different tax law, the revenue lost by reason of the unconstitutionality of the first tax.

It is not to be presumed that Congress would have wished that the correction of an error in the law, resulting from the *Butler* decision, should thus lead to the imposition of a penalty, probably itself unconstitutional and certainly unjust, against a group of taxpayers who have no benefit from, nor interest in, the rights which are said to arise in favor of another group resulting from such correction. The Government will not claim that it has ever asserted its present theory of the law by seeking to collect the Manufacturers Excise Tax upon the weight of the cotton content of tires manufactured and sold between August 1, 1933 and January 6, 1936, containing cotton taxed under Section 9(a) of the Agricultural Adjustment Act, and in the face of its own administrative interpretation over this period of some seven and one-half years its present insistence of invalidity *ab initio* against this single taxpayer is patently indefensible.

B. The failure of Congress, under the 1936 Act, to charge taxpayers, claiming refunds of the processing tax, with sums saved under the Manufacturers Excise Tax law, is without significance.

Processed cotton is used in a vast variety of manufactured articles. A relatively insignificant portion is used in the manufacture of automobile tires. The processor seeking a refund of taxes under the Agricultural Adjustment Act could not know what part, if any, of the cotton in

question subsequently went into tires and was deducted in computing the Manufacturers Excise Tax. Furthermore, even if this could be established, here again no reason appears for charging the processor for a deduction which some other taxpayer has taken in computing another tax. The only instance in which the same taxpayer would be called upon to pay both taxes would be, as here, where the tire manufacturer was called upon to pay the processing tax on floor stocks under Section 16 of the Agricultural Adjustment Act.

In the instant case the taxpayer has not received any refund for taxes paid under Section 16 (R. 86). Any right to any such refund has long since been barred by statute. Revenue Act of 1936, Section 903, 49 Stat. 1747, 7 U. S. C. 645. Hence the question of whether the petitioner could equitably recover the tax under Section 16 without accounting for any savings which it had made as a result of the operation of the proviso, is purely academic. However, if it should be considered that equitably the same taxpayer should not recover both taxes, irrespective of whether any tax had been passed on, there is no need of invoking the theory that the proviso was inoperative *ab initio*. Where privity exists, any claim for the refund of one tax is subject to the Government's right of equitable set-off, and such right is independent of any express statutory provision. *Stone v. White*, 301 U. S. 532, 534-535; *Helvering v. Schine Chain Theatres, Inc.* (C. C. A. 2d), 121 F. (2d) 948, 950; *cf. Lewis v. Reynolds*, 284 U. S. 281, 283. Since this is the well-established law, if any inference is to be drawn from the fact that Congress did not specifically provide for a set-off in the exceptional case where both taxes applied to the same taxpayer, it is that Congress considered that neither tax should be retained where the evidence showed that neither tax had been passed on.

C. The fact that on June 3, 1937 Congress re-enacted most of the provisions of the Agricultural Adjustment Act, omitting Sections 9 and 16, is equally without significance.

The re-enactment of the Agricultural Adjustment Act was seventeen months after the decision in the *Butler* case. By that date the proviso was *functus officio*. Tire manufacturers do not purchase supplies of processed cotton for seventeen months in advance, and by June of 1937 it may safely be assumed that all cotton taxed under either Section 9(a) or 16 had long since been converted and sold.

D. Irrespective of whether the proviso is deemed still to be operative, petitioner's rights should not be affected by the decision in the Butler case.

If the proviso in Section 9(a) applies to cotton taxed under Section 16, which for the purpose of the present argument must be conceded, it necessarily follows that the second tax (the excise tax) was not validly imposed under the law existing at the time when such second tax was collected. The decision of this Court in the *Butler* case does not mention the proviso. The proviso imposes no tax. It operates in conjunction with and in relation to the Manufacturers Excise Tax. Hence, if the proviso is no longer operative that is not because there is anything unconstitutional about the proviso itself, and the Government does not so contend.

The petitioner having paid due regard to the tax requirements of the Agricultural Adjustment Act before their constitutionality had been adjudicated, it now has a status which is not affected by the unconstitutionality of the tax provisions of such law. *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U. S. 371, 374; *Davies' Estate v. Commissioner of Internal Revenue* (C. C. A. 6th), 126 F. (2d) 294, 295, cert. den. 317 U. S. 640; *J. A.*

Dougherty's Sons, Inc. v. Commissioner (C. C. A. 3d), 121 F. (2d) 700. As stated in *J. A. Dougherty's Sons v. Commissioner, supra* (702-3):

> "Nowhere is the propriety of recognizing and accrediting a status produced by a statute before its unconstitutionality has been judicially declared more strongly indicated than it is in the case of tax statutes. The subject taxpayer is under compulsion to pay due regard to the requirements of the statute until its invalidity has been authoritatively adjudicated. The Board of Tax Appeals has so recognized in a number of cases where deductions have been allowed for taxes paid under statutes which were later held to be invalid. * * * All of the events imposing the tax occurred in each of the several years for which deduction is claimed."

In recognition of this rule, after holding as a matter of construction that the proviso was not invalid *ab initio*, the District Court concluded (R. 101):

> "We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350."

III.

BOTH THE RECORD IN THE DISTRICT COURT AND THE FINDINGS OF THE DISTRICT COURT SHOW THAT THE TAXES HEREIN SOUGHT TO BE RECOVERED WERE NOT PASSED ON.

(Answering Respondent's Br. 30-33.)

The section of the law with which we are here concerned is Section 621 (d) of the Revenue Act of 1932 (47 Stat. 267) which, so far as pertinent, provides:

> "No overpayment of tax under this title shall be credited or refunded * * * in pursuance of a court

decision or otherwise, unless the person who paid the tax establishes * * * that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee * * *."

Consistently with the foregoing section, petitioner appropriately alleged in its bill of complaint that the tax sought to be recovered had not been passed on (R. 76), which allegation, upon information and belief, the respondent by answer denied (R. 45). Upon the trial of this issue the evidence showed (R. 90-92) and the Court found (Finding XXII, R. 151-152):

"That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9(a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9(a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to $0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before

demand was first made upon said company that it pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them."

It was further shown by stipulation (R. 91):

"that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act."

Contrary to the impression which is suggested by respondent's brief (p. 30, p. 32), the District Court did not make any finding to the effect that the tax sought to be recovered was included in the price of the tires or had otherwise been collected. On this issue it did conclude, however (Conclusions of Law VII, R. 156):

"That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621 (d) of the Revenue Act of 1932."

That in so concluding the District Court erred, may be briefly pointed out.

A. Where, as here, it is established that a sales tax was not assessed against or contemplated by the taxpayer until long after the article with respect to which the tax was assessed had been sold, the taxpayer makes a prima facie case that such tax was not included in the price of the article sold.

The precise question is whether a taxpayer who has fixed the selling price of tires containing cotton taxed under Section 16 of the Agricultural Adjustment Act, under the belief that said cotton content was exempt from further tax and was not subject to the Manufacturers' Sales Tax (the price fixed being no greater than the price fixed for similar tires containing cotton admittedly exempt from such further tax), must present additional proof in order to show, *prima facie*, that the contemplated and unassessed sales tax was not added as a part of the selling price of such tires. Where that question has been presented the courts have uniformly held that the uncontemplated tax was not added, and in the very nature of things could not have been added, as a part of the selling price. *Campana Corporation v. Harrison* (C. C. A. 7th), 114 Fed. (2d) 400, 407-408; *Skinner v. United States* (D. C. Ohio), 8 Fed. Supp. 999, 1004-1005; *Con-Red Exchange, Inc. v. Hendrickson* (D. C. Wash.), 28 Fed. Supp. 924, 927; *Einson-Freeman Co., Inc. v. Corwin, Collector* (D. C. N. Y.), 29 Fed. Supp. 98, rev'd on other grounds 112 F. (2d) 683; *University Distributing Co. v. United States* (D. C. Mass.), 22 Fed. Supp. 794, 799.

Bearing in mind that the Government offered no evidence whatever on this subject, that it stipulated that if called it would be the sworn testimony of the officer of the taxpayer in charge of its accounting records that the tax in question was not in fact included in the selling price of the tires (R. 83-92), that no request was made in open court or otherwise for the production of the taxpayer's books, and that the competency of petitioner's proof was

not challenged, and under the stipulation could not be challenged (R. 80, 189, 257-258), the conclusion of the trial court that petitioner had not established a *prima facie* case upon this issue is plainly contrary to authority and in direct contradiction of the evidence and of the Court's findings.

B. Under the stipulation of this case the failure to produce the records and books of the taxpayer is without significance.

In its brief (32-33) respondent cites a number of cases for refund of taxes paid under the Agricultural Adjustment Act. The cases cited involve claims brought under Section 902 of the Revenue Act of 1936 (49 Stat. 1747), which imposes more difficult conditions upon the taxpayer than does Section 621 (d) of the Revenue Act of 1932, *supra*. In none of the cases cited did it appear that at the time the price of the article was fixed, and at the time it was sold, the taxpayer did not have in contemplation the tax sought to be refunded. So far as appears, these cases are cited merely in support of the rule that upon questions of fact the decision of the trial court is final; but as we have already seen, the District Court in this case made no finding that the tax had been passed on. Its decision was that petitioner had failed to sustain the burden of proof upon that issue, this being coupled with the statement in the opinion (R. 108) that

> "No books of account or sales records were produced and no explanation for their non-introduction was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue."

The question thus seemingly raised by the District Court does not involve a question of sufficiency of proof, but of competency. If, as the District Court held, the taxpayer was not obligated under the law to pay the Manufacturers'

Excise Tax upon cotton taxed under Section 16 of the Agricultural Adjustment Act, and if, as the Court *found*, the taxpayer so understood its obligation at the time the tires in question were sold, no valid inference arises that any books or records of the taxpayer would disclose facts contrary to the primary evidence of the testimony of the officer of the taxpayer in a position to know to the effect that the tax to his knowledge was not included in the selling price of the tires. If the Government thought otherwise it should not have waived objections to competency by stipulation (R. 189, 257-258). If the Court thought otherwise, irrespective of such waiver, it should have excluded the stipulated testimony on the ground that the books and records were the best evidence, or failing in this, should have granted petitioner's motion to re-open the case to permit the introduction thereof. Such motion and supporting affidavits (R. 110-135) completely rebut any inference that the records were withheld for any purpose inconsistent with truth or justice, and as already shown, the findings actually made were sufficient to support a judgment in favor of petitioner.

CONCLUSION.

The issue discussed in Section IV of respondent's brief has been fully presented in our opening brief and therefore it is not discussed further in this brief. In Points I, II and III respondent has raised issues not decided by the Court of Appeals although presented to that Court as well as to the District Court. Petitioner submits that on none of the four Points presented in respondent's brief is respondent entitled to prevail, and that for all of the reasons hereinbefore presented the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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